No. 93-313

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1993

BDO SEIDMAN, BRACEWELL AND PATTERSON, J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, and WILLIAM M. TEMPLETON,

Petitioners,

v.

GAYLON D. SIMMONS, GLORIA ANNETTE TURNER SIMMONS, GREENWICH INSURANCE COMPANY, and THE UNITED STATES OF AMERICA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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PARTIES TO THE PROCEEDING

The following are parties to the proceeding in the United States Court of Appeals for the Fifth Circuit[1]:

1. Gaylon D. Simmons
2. Gloria Annette Turner Simmons
3. BDO Seidman
4. Bracewell and Patterson
5. Greenwich Insurance Company
6. William M. Templeton
7. J.C. Templeton
8. Joe H. Foy
9. Harry V. Carlson
10. Robert Ted Enloe, III
11. W.A. Griffin
12. Thomas L. Kister
13. Leonard Leon
14. Edward T. Cotham
15. United States of America

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[1] TGX Corporation appeared in the style of the court below but was not a party to the proceeding in the United States Court of Appeals for the Fifth Circuit. None of the Petitioners is a corporation, with either a parent company or subsidiaries.

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SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners request that the Court resolve the direct conflicts between the United States Court of Appeals for the Fifth Circuit in the case below and both the United States Court of Appeals for the Sixth Circuit in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993) and this Court's prior decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) and *William Danzer & Co. v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633 (1925).

The Brief in Opposition to the Petition for Certiorari filed August 26, 1993, by Gaylon D. Simmons and Gloria Annette Turner Simmons (the "Simmons") is predicated in part upon a then-pending suggestion for re-hearing *en banc* in *Plaut*.[1] Continental Insurance Company filed a separate Petition for Certiorari, No. 93-611, on the same grounds asserted in the instant Petition.[2] Thereafter, the United States (the "government") filed its brief which agrees that the direct conflict between the Fifth Circuit in this case and the Sixth Circuit in *Plaut*, should be resolved by this Court because of the national importance of determining the constitutionality of Section 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b) (1991). The government suggests, however, that these Petitions do not involve a judgment which is "genuinely final," and that they therefore "are not appropriate vehicles for

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[1] The Sixth Circuit has since denied the application for rehearing *en banc*. No. 92-5591, 1993 WL 495736 (6th Cir. Oct. 14, 1993).

[2] Continental Insurance Company has asked that it be substituted as the real party in interest in place of Greenwich Insurance Company, a named respondent in Petition No. 93-313.

this Court to reach the underlying constitutional issues." *Brief for the United States* at 7.

Petitioners file this Reply for two reasons. First, the government's assertion is apparently predicated upon a misunderstanding of the facts of this case which has resulted in a false distinction between this case and *First RepublicBank Corp. v. Pacific Mutual Life Insurance Co.*, Pet. No. 93-609. This Reply presents procedural facts which bear upon Respondents' argument regarding the "genuine finality" of an unappealed judgment of dismissal without prejudice. Second, a separate constitutional question of equal national import is raised by this Petition, but not by that in *First RepublicBank*; the issues should be considered contemporaneously to avoid piecemeal litigation. As this Reply will demonstrate, this Petition provides the most appropriate vehicle for complete and final review of all the pending constitutional questions.

ADDITIONAL PROCEDURAL HISTORY

The government argues that the dismissal at issue is without prejudice, has no *res judicata* effect, and is therefore not "genuinely final." *Brief for the United States* at 8. The government overlooks key facts to reach this conclusion.

This Petition arises from two consolidated cases ("the 1987 suit" and "the 1990 suit").[3] No Section 10(b) claims

[3] Civil Action Nos. 87-5298 and 90-0849 on the docket of the United States District Court of the Eastern District of Louisiana were consolidated by order of the Honorable Peter H. Beer; the

were asserted in the 1987 suit until July, 1991. By that time, this Court had decided *Lampf* and the date on which a case must have been pending for Section 27A to apply had passed. Thus, the Simmons could only seek reinstatement of the 1990 suit.

After *Lampf*, and in response to Petitioners' Motions for Summary Judgment, the Simmons conceded that their claims in the 1990 suit were eradicated by the rule clarified in *Lampf*. However, before entry of judgment in the 1990 case, the Simmons filed a motion seeking leave to amend their 1987 suit to add to it their Section 10(b) claims. Because more than four years had passed since the transaction, the Simmons sought to invoke the "relation back" doctrine to attain in 1991 a filing date "as of" 1988.

Recognizing that the pending dismissal of the 1990 suit would pose a *res judicata* bar to their proposed amendment, the Simmons requested the trial court to either withhold judgment or dismiss the 1990 suit without prejudice. The trial court granted the Simmons' request by dismissing the 1990 case without prejudice.

The Simmons' second assertion of the same claims ultimately failed. Although they were permitted to amend the 1987 suit, their claims could not relate back to the earlier filing date. Petitioners again filed dispositive motions, which were granted. The Simmons Section 10(b)

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record in the Court of Appeals included the entire record of the consolidated proceedings.

claims were dismissed with prejudice from the 1987 suit.[4] Neither dismissal was ever appealed.

REPLY TO ARGUMENTS RAISED IN BRIEFS IN OPPOSITION

I. CONTRARY TO RESPONDENTS' ASSERTION, THE JUDGMENT THE SIMMONS SEEK TO AVOID IS "GENUINELY FINAL"

Respondents' argument that this Petition is not an appropriate vehicle for this Court to reach the underlying constitutional issues is based on the premise that the dismissal was "without prejudice" and therefore does not have a *res judicata* effect. *Brief for the United States* at 7; *Brief in Opposition* at 6. The government's initial suggestion that "the dismissal without prejudice makes it possible to affirm the judgment permitting reinstatement on a quite narrow basis," *Brief for the United States* at 7-8, is contradicted by its Conclusion which urges that this case be held pending the disposition of *First RepublicBank*. *Brief for the United States* at 13.

Respondents' assertion that the judgment at issue is not "genuinely final," *Brief for the United States* at 8; *Brief in Opposition* at 6-10, is really an effort to provide an excuse for Congress to undermine both the Judiciary's interest in its final judgments and the Fifth Amendment's guarantees that the litigants' vested rights will not be

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[4] The 1987 suit was dismissed with no indication of with or without prejudice. As a matter of law, that dismissal is with prejudice. Fed. R. Civ. P. 41(b).

taken without Due Process and Just Compensation. The first mistake in this position is that any narrow window seemingly opened by a limitations judgment "without prejudice" has nothing whatsoever to do with the separation of powers doctrine. The judiciary's constitutional interest in a final judgment is no different if that judgment is without prejudice. *See* U.S. Const. art. III.

The second fallacy in Respondents' assertion is its predication upon the assumption that "the district court's order left the Simmonses entirely free to refile their securities claims." *Brief for the United States* at 8; See *Brief in Opposition* at 7. While the dismissal "without prejudice" technically left the Simmons free to file the same claims in another suit, it neither prevented the judgment from becoming final and unappealable nor did it alter the effects of the *Lampf* holdings.[5] The Simmons could only overcome the *Lampf* time limit defenses (limitations and repose) by adding their claims to a proceeding filed prior to the expiration of the limitations and repose periods, and having the added claims relate back to the date that proceeding began. They did not appeal their unsuccessful attempt to save their claims in this manner.

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[5] In fact, a dismissal based upon a time bar, by its very nature, prevents the refiling of the same action in any jurisdiction applying the same time bar. *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045-46, *reh'g denied*, 880 F.2d 818 (5th Cir. 1989) and *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983). In light of *Lampf* and *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991), there is a uniform time limit applying to these Section 10(b) claims.

The government's argument regarding this judgment is based on a distinction without a meaningful difference. *Lampf* dealt with time limit defenses, not the *res judicata* defense. Section 27A purports to permit reinstatement of certain cases which were dismissed as time barred. Whether *res judicata* is also available to a defendant does not affect the "finality" of such a judgment.

The unappealed dismissal without prejudice forever terminated the 1990 suit. It is that very dismissal the Simmons are attempting to discard by reinstatement. By definition, the dismissal was a final judgment; it was not appealed; and the fact that the District Court and the Fifth Circuit have held the dismissal was based on the time limits announced in *Lampf* (and not on some voluntary basis) further illustrates the unquestioned finality of the judgment and the existence of the limitations and repose defenses.

Any significance, however tangential, of whether or not this judgment has a *res judicata* effect, was eliminated when the dismissal without prejudice of the 1990 suit was followed by the dismissal of the 1987 suit *with prejudice.* The latter did result in the Simmons' claims being forever barred. There is no justification, legal or equitable, for following the government's initial suggestion, which, if accepted, could have the anomalous result of reinstating this case under Section 27A(b), while the claims in its companion case, *First RepublicBank,* would be dismissed, upon a finding of unconstitutionality of the statute.

II. ONLY THIS CASE PRESENTS THE OPPORTUNITY TO REVIEW THE FIFTH CIRCUIT'S INTERPRETATION OF THE THREE-YEAR STATUTE OF REPOSE FOR SECTION 10(b) ACTIONS, WHICH IS IN CONFLICT WITH THIS COURT'S HOLDINGS IN *LAMPF* AND *DANZER*

Respondents concede that this Petition currently provides the only vehicle for this Court to consider the Fifth Circuit's view that Section 27A(b) requires reinstatement of cases in which the three-year period of repose expired before the filing of suit on a Section 10(b) claim. *Brief for the United States* at 9. The issue of whether Section 27A(b) can constitutionally be applied to reinstate claims eradicated by the statute of repose is of national importance and affects the rights of numerous litigants in pending cases. Failure to consider that issue may prevent the final disposition of this case and others even if this Court decides the issue which arises both here and in *First RepublicBank*. Accordingly, this Petition should be granted.

Contrary to Respondents' assertion, the Fifth Circuit's conclusion that the repose period affects only remedy and not liability is directly contradicted by this Court's determination in *Lampf*. In addition to the question of what time limits apply to rights and liabilities under Section 10(b), this Court in *Lampf* addressed the *nature* of the three-year period. The *Lampf* plaintiffs argued that if the one-and-three-year scheme were applied to Section 10(b) claims, their cause of action should nonetheless be saved by the equitable tolling doctrine. The Court squarely concluded that "[t]he 3-year limit is a period of repose inconsistent with tolling."

Lampf, 111 S. Ct. at 2782. " '[T]he three-year period can have no significance in this context other than to impose an outside limit.' . . . Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." *Id.* (quoting Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 235, 288 (1989)).

The legislative histories demonstrate that when Congress adopted the Securities Act and Securities Exchange Act, it intended the three-year limit to be an absolute beyond which liability would not exist. As the Seventh Circuit has observed, "The legislative history makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute." *Norris v. Wirtz*, 818 F.2d 1329 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987) (citing 1 *Federal Securities Law – Legislative History 1933-1982*, p. 1010 (1983)).

Respondents suggest that *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), can be interpreted to permit a constitutional reading of Section 27A(b) as applicable to cases in which the three-year period of repose expired prior to suit. Respondents' argument ignores not only the plain language of Section 27A(b), but also this Court's holdings in *Lampf* and *William Danzer and Co. v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633 (1925).

In *Usery*, congressional creation of new liability was not preceded by an affirmative declaration as to the rights and remedies of potential litigants. This Court has

never sanctioned the taking of vested rights by reinstituting old liability which has been extinguished by virtue of a prior legislative pronouncement. As this Court held in *Danzer*, the creation of a right of repose, coupled with the running of the statutory period, vests a potential defendant with a substantive right to remain free from liability. That right is protected by the Due Process and Takings Clauses of the Fifth Amendment. Neither *Usery* nor any other case cited by Respondents has involved a legislative taking of vested property rights. Respondents err when they argue that this Court's holding in *Danzer* may be ignored.

Furthermore, nothing in Section 27A(b) purports to create any new liability. Members of Congress who supported Section 27A urged that the amendment would do nothing more than permit the prosecution of claims "commenced on or before June 19, 1991" based upon already existing liability. By its plain language, the statute purports to affect only claims based upon pre-existing liability.

CONCLUSION

The judgment entered in this case is final and gives rise to the constitutional rights guaranted to the Judiciary as well as Respondents. Section 27A(b)'s circumvention of these rights is the subject of the split between the Sixth and Fifth Circuits. Moreover, this Petition raises an additional constitutional question: that prior to the institution of this lawsuit, the expiration of the period of repose

vested Petitioners with the substantive property right to freedom from liability.

The Fifth Circuit's holdings conflict with the Sixth Circuit's analysis in *Plaut* and this Court's holdings in *Danzer* and *Lampf*. The writ of certiorari should issue.

Respectfully submitted,

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